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No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, THE CENTER FOR PUBLIC REPRESENTATION, NATIONAL HEALTH LAW PROGRAM, ADVOCATES FOR BASIC LEGAL EQUALITY, INC., JUSTICE IN AGING, WESTERN CENTER ON LAW AND POVERTY, LEGAL AID JUSTICE CENTER, AND PUBLIC JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

Amici are not for profit legal services and civil rights organizations that often represent classes certified pursuant to Fed. R. Civ. P 23(b)(2) seeking to enjoin violations of federal statutory and constitutional rights.[1]

The **Legal Aid Society of the District of Columbia** (Legal Aid) was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Legal Aid Bylaws, Art. II § 1. Legal Aid is the oldest and currently largest general civil legal services provider in the District of Columbia advocating on behalf of its clients to preserve affordable housing, ensure access to critical safety net benefits, protect consumer rights, and keep families safe and stable. In addition to handling individual, direct representation cases, Legal Aid also litigates class action matters to enforce federal statutory and constitutional rights on behalf of people living in poverty.

The Center for Public Representation (the Center) is a national public interest law firm with

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[1] All parties have consented to this brief by filing letters consenting to submission of *amicus* briefs in support of either side. No party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund preparation or submission of this brief. No person other than *amici*, their members, or their counsel made such a monetary contribution.

offices in Northampton and Newton, Massachusetts, that advocates for the rights of children and adults with mental illness, intellectual and developmental disabilities and brain injuries. For more than forty years, the Center has represented its clients in dozens of states in cases related to entitlement to appropriate integrated community based services, fair housing rights, inappropriate nursing home placements, involuntary commitment, and conditions in prisons and juvenile justice facilities.

For over 45 years, the **National Health Law Program** (NHeLP) has engaged in litigation and policy advocacy on behalf of low-income people, older adults, people with disabilities, and children. NHeLP also conducts research and provides education on a range of issues affecting these populations, including health insurance coverage and access to the courts. When clients are being harmed, NHeLP works through the courts to enforce legal rights that are set forth in public benefits and civil rights laws.

Advocates for Basic Legal Equality, Inc. (ABLE) is a regional non-profit law firm that provides a full range of free, high quality legal services to low-income individuals and groups to help them achieve self-reliance, economic opportunity, and equal justice. ABLE serves clients in thirty-two counties in Northwest and Western Ohio as well as migrant farmworkers and immigrant workers throughout Ohio. Established in 1969, ABLE has a long history of representing low-income clients in all types of complex civil litigation, including numerous class action cases. ABLE's work covers the areas of

housing, public benefits, civil rights, and education and, since its founding, it has utilized systemic litigation and impact advocacy as a method to achieve greater success for low-income clients with long-term results.

Justice in Aging (formerly known as the National Senior Citizens Law Center) is a non-profit legal services organization that since 1972 has used the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. It provides representation to classes of poor seniors seeking access to Social Security Act federal benefits programs, including Medicare; Medicaid; Old Age, Survivors' and Disability Insurance; and Supplemental Security Income.

The **Western Center on Law and Poverty** (WCLP) is the oldest and largest statewide support center for legal aid advocates in California. WCLP regularly litigates class actions and other cases of broad impact in federal and state court primarily to enforce the rights of low-income people regarding the public programs and systems they use to maintain health, housing and socioeconomic stability. The ability to obtain class-wide injunctive relief where warranted is essential to WCLP's work.

The **Legal Aid Justice Center** provides free legal representation for low-income individuals in Virginia. Its mission is to serve those in our communities who have the least access to legal resources and to address the root causes of poverty through local and statewide organizing, education,

and advocacy. It has handled multiple class action cases on behalf of public housing residents, prisoners, immigrants, and low-wage workers, among others.

The **Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal advocacy organization founded in 1985, has a longstanding commitment to protecting the rights of Maryland residents whose access to the courts is severely limited by the very nature of their claims and their life circumstances, including low- and moderate-income consumers, low-wage workers, low-income tenants, homeless students, prisoners, and persons eligible for government-administered subsistence income. The PJC uses litigation, including class actions and appeals in state and federal courts, legislative and administrative advocacy, and public education to address structural and systemic economic, racial and other inequities.

Amici will address the first question presented in the context of class actions seeking injunctive relief.

SUMMARY OF ARGUMENT

Petitioner's narrow complaints about Telephone Consumer Protection Act (TCPA) class actions cannot justify broadly disrupting Article III case or controversy doctrine. The kind of doctrinal upheaval that would be required to dismiss class actions based on unaccepted individual offers to the named plaintiffs cannot be limited to class actions primarily seeking damages under the TCPA or similar statutes. It would also threaten actions to enforce federal statutory and constitutional rights

like those brought by *amici*. Injunctive class actions are efficient and equitable ways to redress acts or failures to act in violation of federal law affecting large groups. Impairing the efficacy of such class actions by empowering defendants to impose individual settlements on named plaintiffs against their will would weaken the private enforcement of civil rights laws on which Congress has long relied.

The Constitution should not be pressed into service to permit class action defendants—or any defendants—to force the dismissal of a complaint just by making a unilateral and unaccepted settlement offer before a class certification motion has been filed. An unaccepted offer provides no redress. An *offer* of an injunction, in particular, is not an injunction. Such an offer does not, therefore, moot the case by making judicial redress impossible. A court has no authority to force the plaintiff to accept a settlement offer under Fed. R. Civ. P 68. Nor can a court enter an unaccepted offer of judgment as if it were a default; Rule 68 encourages settlement by imposing costs on a party that unwisely rejects an offer of judgment, not by turning an offer into a *diktat*.

Even if an offer of "complete" relief could moot a case, the kind of general, no-fault injunction offered here does not provide full relief. Full relief requires a determination that particular conduct is unlawful and an injunction forbidding the conduct. Full relief enables a plaintiff to seek contempt sanctions if the defendant repeats the conduct, and the only issue in the contempt proceedings would be whether the defendant engaged in the same prohibited conduct. Moreover, other victims of the same conduct would be

able to invoke the judgment to preclude the defendant if it engages in the same conduct as to them; they would not have to re-litigate whether the conduct is a violation of the statute. The offered injunction here expressly disclaimed any admission of liability, and its operative term (forbidding violation of the TCPA) fails to prohibit repetition of the very conduct alleged in the complaint because *whether* the TCPA forbids that conduct remains unresolved, leaving the plaintiff and any other victims to litigate the whole question of the legality of the conduct anew. A general, no-fault injunction, therefore, does not resolve the claim presented by the plaintiff or afford full relief on the claim.

ARGUMENT

The case or controversy requirement of Article III is the bedrock of the judicial branch. Shifting that bedrock to crush an unwelcome "cottage industry of attorneys" pursuing TCPA or similar claims (*see* Pet'r Br. 4) is likely to produce serious and unintended doctrinal consequences. The effects of concluding that a defendant can moot a case by making a settlement offer that the plaintiff rejects may be felt in many areas of the law, including class actions seeking injunctive relief to redress statutory and constitutional violations.

Petitioner's fundamental submission is that there is no longer a justiciable controversy when the defendant has offered an ostensibly complete settlement, even though the plaintiff has not accepted the offer and continues to seek relief from the court. That proposition seemingly would apply to

an action for injunctive relief as well as to an action for damages. As an initial matter, an unaccepted offer—even of generous and seemingly full relief—does not divest a district court of the ability to order relief. But even if tendering a sum of money might seem the close equivalent of actually paying money in settlement, the offer of an injunction is not the close equivalent of an injunction, especially when the terms of the injunction are not the result of the exercise of equitable discretion in light of adjudicated facts establishing the defendant's liability.

If Petitioner were correct that a defendant's unaccepted offer of relief could moot a case, then defendants in injunctive actions could avoid adjudication of meritorious constitutional and statutory claims just by offering injunctive relief to the named plaintiffs in Fed. R. Civ. P 23(b)(2) class actions before a certification motion has been filed, even though the unaccepted offers would not provide any actual relief. Moreover, if the kind of "no fault" injunction offered in this case were deemed an offer of complete relief, defendants could moot injunctive class actions without even satisfying the established standard for mootness based on the voluntary cessation of illegal conduct, leaving plaintiffs without adequate protection against resumption of the illegality.

Suppose, for example, that a real estate agency steered a black family away from available housing in a predominantly white neighborhood according to what seemed to be its standard practice. If the family sued on behalf of a class to enjoin such unlawful discrimination, the real estate agency could

not force dismissal of that lawsuit merely by offering (whether under Fed. R. Civ. P. 68 or otherwise) to consent to an injunction in favor of the named plaintiffs requiring the agency to comply in the future with the Fair Housing Act, but declining to admit any of the allegations in the complaint or that its prior conduct violated the Act. The unaccepted *offer* would not moot the case because a court could not enter the injunction without determining liability unless the parties agreed to it as a condition of dismissal under Fed. R. Civ. P. 41. And even if the offer were somehow treated as unilaterally binding on the defendant, it would not moot the case as a form of voluntary cessation because the general terms of the proposed injunction would not forbid repetition of the unlawful conduct with the required specificity in light of the agency's refusal to acknowledge that it had violated the Fair Housing Act.

The settlement offer in this case did not moot it for the same reason. The TCPA authorizes injunctive relief, 47 U.S.C. § 227(b)(3)(A), the class action complaint in this case sought injunctive relief, and Petitioner's offer of judgment and settlement offer included an injunction. JA 23 (complaint); Pet. App. 53a (offer of judgment), 55a-56a (proposed stipulated permanent injunction), 58a-59a (settlement offer). But like the Fair Housing Act hypothetical above, the offer of an injunction in this case came without an acknowledgement that Petitioner had violated the TCPA, or a specific prohibition against engaging in the same conduct in the future. Pet. App. 56a. That kind of no-fault injunction is not complete relief.

A. Unaccepted Offers of Injunctions Do Not Redress Injuries.

"To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citations omitted), *quoted in Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013). A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin*, 133 S. Ct. at 1023 (quoting *Knox v. SEIU*, 132 S. Ct. 2277, 2287 (2012)). That is, if the plaintiff had Article III standing to begin with, a settlement offer moots the case if it makes redress by a favorable decision impossible.

Petitioner's settlement offer did not make it impossible for the district court to grant relief. "When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before." *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting). In particular, a rejected offer of a stipulated injunction (even one providing greater relief than the one Petitioner offered in this case) has no real world effect on the rights and obligations of either party; it neither obligates the defendant nor protects the plaintiff from future injury.

As Justice Rehnquist noted in his concurring opinion in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), a putative class action "is moot in the Article III sense only if this Court adopts a

rule that an individual seeking to proceed as a class representative is *required* to accept a tender of only his individual claims." *Id.* at 341 (emphasis added). The Court has never adopted such a rule, and could not do so without giving the defendant the "practical power" to prevent class certification in every case. *See id.*[2] That would be contrary to *Roper*, where the Court held that the class representatives' individual interest in the litigation was "sufficient to permit their appeal of the adverse class certification ruling," *id.* at 340, notwithstanding the defendant's tender of a judgment in favor of the class representatives on their individual claims and the district court's actual entry of the tendered judgment. It follows *a fortiori* from *Roper* that a putative class representative retains a constitutionally sufficient interest in the district court's initial consideration of a motion to certify the action as a class action, notwithstanding a rejected settlement offer.

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[2] By contrast, in *California v. San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 313 (1893), the State, as a matter of state law, could not refuse the railroad's tender of full payment of "the sums sued for in this case, together with interest, penalties, and costs." *See* Pet'r Br. 14 n.3 & 16-19. Thus, the tenders in *San Pablo* and *San Mateo County v. Southern Pacific Railroad Co.*, 116 U.S. 138, 142 (1885) were accepted. Full payment of a debt (together with payment of any penalties and interest specified by law for late payment) moots a case by extinguishing the cause of action to collect an unpaid debt. *San Mateo*, 116 U.S. at 142 ("there is no longer an existing cause of action in favor of the county against the railroad company."); *San Pablo*, 149 U.S. at 313 (writ of error "must be dismissed, because the cause of action has ceased to exist."). Petitioner's unaccepted settlement offer, by contrast, did not eliminate the TCPA injuries alleged in the complaint (annoyance and the monetary cost of receiving the unwanted message) nor the plaintiff's cause of action.

Roper also forecloses by necessary implication Petitioner's submission that a district court can render a case moot by entering judgment according to the terms of the defendant's rejected settlement offer. (Pet'r Br. 21). That is exactly what the district court did in *Roper*, and what this Court held did not moot the appeal of the denial of class certification. Petitioner's argument that a district court has the authority to enter such a judgment (that is, to exercise jurisdiction over a dispute) based on a rejected settlement offer because of its equitable authority to dispose of moot cases (which are beyond the court's jurisdiction) is paradoxical. *Cf. Asarco, Inc. v. Kadish*, 490 U.S. 605, 620 (1989) ("It would be an unacceptable paradox to exercise jurisdiction to confirm that we lack it."). Power to dispose of a moot case is not power to moot a case by disposing of it.[3]

Because an unaccepted settlement offer does not alter the legal rights and duties of the parties by its own force, and the court can neither compel the plaintiff to accept the settlement nor enter its own judgment absent a settlement, such an offer cannot make it impossible for a court to grant relief.

Even if the impulse "to refuse to 'expend judicial and litigation resources resolving the merits of a claim the defendant informs the Court it will fully satisfy'" (Pet'r Br. 19) (quoting U.S. Br. 13, *Genesis HealthCare*)) is understandable, the Court

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[3] Nor can a court enter a judgment offered (but not accepted) under Rule 68 as if it were a default judgment, as authorized in *McCauley v. Trans Union LLC*, 402 F.3d 340 (2d Cir. 2005). A default is an admission of liability; a party that offers to settle while disputing liability has not defaulted.

should not deviate from its Article III precedents to target class action litigation under the TCPA and similar laws. To begin with, this Court has been reluctant to allow a party to thwart a determination of its liability by unilateral action. That is one reason for the "formidable burden" of the voluntary cessation doctrine, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013), and for the different treatment of *vacatur* when a case is mooted by a settlement rather than by happenstance. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership.*, 513 U.S. 18 (1994). A party that has violated federal law should not be able to avoid adjudication of its liability by imposing a settlement on an unwilling plaintiff.

There is no reason to distort Article III mootness doctrine in order to control seemingly unreasonable refusals to settle. To be sure, plaintiffs, no less than defendants, can make unreasonable judgments about the strength of their positions. Plaintiffs can refuse fair settlement offers and persist in futile litigation efforts, just like defendants. Addressing that kind of conduct is the everyday work of trial judges, and courts have many tools available to encourage appropriate settlements. Not the least of these tools is Fed. R. Civ. P. 68, which creates a strong incentive to accept a reasonable settlement offer. But the consequence for a party under that Rule of refusing to accept an offer is paying the other side's costs if the party fails to win a more favorable judgment, not dismissal of the lawsuit. *See Chapman v. First Index, Inc.*, Nos. 14-2773 & 14-2775, 2015 WL 4652878, at *3 (7th Cir. Aug. 6, 2015); *Hooks v. Landmark Indus., Inc.*, No. 14-20496, 2015 WL 4760253, at * 3 (5th Cir. Aug. 12,

2015); *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 WL 4979406, at *5 (1st Cir. Aug. 21, 2015).

Nor is there a good reason to require putative class representatives to accept settlement offers that would satisfy their individual claims but leave the class with nothing. Class certification is an efficient way of resolving litigation involving the same action or failure to act in violation of law affecting many individuals. Class representatives should be scrupulous about the interests of the class they seek to represent in a lawsuit filed as a class action even before certification. The typicality and adequacy requirements in Fed. R. Civ. P 23(a) favor the selection of a class representative who will insist on relief for the entire class (and will therefore reject an individual settlement). For example, in a (b)(2) class action challenging the procedure used to terminate a property interest in government benefits, a putative class representative might reject a settlement offer that would grant her individual relief by restoring the terminated benefits but that would leave the class-wide violation unremedied. The heavy constitutional artillery of Article III should not be deployed for the purpose of discouraging class certification by requiring class representatives to accept settlements of their individual claims without regard to the class.

B. No-Fault Injunctions Do Not Provide Complete Relief.

Even if an unaccepted offer of complete relief could moot a case, the offer of a no-fault injunction

does not provide complete relief.[4] Unlike an injunction (or other relief) entered by default, the injunction Petitioner offered did not determine whether the conduct alleged in the complaint violated the TCPA, and hence failed to prohibit the repetition of that very conduct by generally forbidding future TCPA violations.

Because the offered Injunction simply restates an existing statutory prohibition, it does not offer any more specific protection than the TCPA itself.[5] In the absence of a determination that Petitioner's transmission of text messages to Gomez and the rest of the proposed class violated the TCPA, the Injunction would not even stop Petitioner from engaging in the very same conduct again. At the very least, the district court would have to decide the same question of TCPA liability presented in the complaint before it could enforce the Injunction—which is precisely why that liability question would not be moot. As in *Knox*, 132 S. Ct. at 2287-88,

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[4] Contrary to Petitioner (e.g., Br. 7), there was no finding of complete relief below. The district court merely accepted Petitioner's undisputed claim that its Rule 68 offer of judgment would have provided complete relief. Pet. App. 40a. The court of appeals did not examine the completeness of the relief offered, and did not even mention the prayer for an injunction. *Id.* at 3a, 5a-6a.

[5] Petitioner offered to "consent[] to the entry of this Stipulated Permanent Injunction without admitting any liability or admitting any allegations in the complaint." Pet. App. 56a. Moreover, Petitioner agreed "to an injunction barring it from using automated telephone equipment to send text messages to mobile phones in violation of the TCPA," but "is not prohibited from sending text messages as otherwise permitted by the TCPA." *Id.*

where this Court declined to find mootness based on the SEIU's refund of fees, Petitioner's refusal to admit wrongdoing, and the uncertainty about how the relief would be implemented mean that a live case or controversy persists.

1. An injunction that does not determine liability does not provide complete relief.

A judgment that does not adjudicate the defendant's liability for the conduct alleged in the complaint does not provide complete relief. As the Court stated in a related context, "[t]he prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued." *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406 (1900). The adjudication of cases and controversies involves more than the judicial reassignment of money or property from one party to another. The court's most fundamental task is to give reasons for granting material relief by determining a claim that a legal right has been violated. Ordinarily, such a determination of liability is inherent in the issuance of an injunction. Rule 65(d)(1)(A) requires every injunction to include "the reasons why it issued." Except for a consent judgment, those reasons must include either a determination by the court or, if the defendant defaults, an admission by the defendant, of an actual or threatened violation of a legal right—*i.e.*, a determination of liability.

Moreover, when there is a justiciable case or controversy at the outset, the redress available to the

plaintiff includes a determination of legal rights, "whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 243-44 (1937) ("on repudiation by the insurer of liability in such a case and insistence by the insured that the repudiation was unjustified because of his disability, the insured would have 'such an interest in the preservation of the contracts that he might maintain a suit in equity to declare them still in being.'") (citations omitted); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270 (1941) (jurisdiction over insurer's suit to determine its obligations under policy); *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 126 (2007) (noting Court's acceptance of jurisdiction to provide declaratory relief).[6]

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[6] The Seventh Circuit's holding in *Chathas v. Local 134 IBEW*, 233 F.3d 508 (7th Cir. 2000), that an unaccepted offer of judgment mooted a complaint for injunctive relief, is no longer good law in light of *Chapman v. First Index, Inc.*, 2015 WL 4652848 (7th Cir. Aug. 6, 2015). *Chathas* was mistaken, in any event, in asserting that a plaintiff was not entitled to insist (as a reason for refusing an offer of a permanent injunction) on a determination of the defendant's liability because a defendant can default. *See Chathas*, 233 F.3d at 512 (citing *Reynolds v. Roberts*, 202 F.3d 1303, 1315 (11th Cir. 2000)). A default is a binding admission of liability in that case, even if some authorities treat defaults as not issue preclusive in other litigation. Restatement (Second) of Judgments § 27 cmt. e (1982); *but see In re Catt*, 368 F.3d 789, 791-92 (7th Cir. 2004) (noting authority giving preclusive effect to default judgments). In *Genesis HealthCare*, petitioner's counsel assured the Court that if the district court had entered the judgment offered in that case under Rule 68, the judgment would have a preclusive effect with regard to FLSA claims of other potential members of a collective action. Oral Arg. Tr. 3-5, Dec. 3, 2012.

Even before the Declaratory Judgment Act, a party could seek a judgment for nominal damages to determine legal rights in a form that would be preclusive in any future dispute between the parties. Dan B. Dobbs, Handbook of the Law of Remedies § 3.8, at 193 (1973). In *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997), the Court assumed that an unsatisfied prayer for nominal damages would have been sufficient to avoid mootness, but concluded that such relief was "nonexistent" in that case because of the State's constitutional immunity. The purpose of a nominal damages award was to declare and determine legal rights. For example, courts historically awarded nominal damages to declare the falsity of a defamatory publication, even in the absence of any actual and compensable harm to reputation. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 765 (1985) (White, J., concurring in the judgment).

This Court has also recognized in other contexts that—once a justiciable controversy exists—a party can have an interest in a legal ruling resolving that controversy, wholly apart from any award of material relief. In *Camreta v. Greene*, 563 U.S. 692, 131 S. Ct. 2020 (2011), the Court held that the dismissal of damages claims against a child protective services worker on the basis of qualified immunity did not moot an appeal of a lower court ruling that the worker's conduct was unconstitutional. The Court ruled that the worker retained a live personal stake in the legal rule governing his future conduct. *Id.* at 2029. In other words, the Court determined that the worker had the required interest in obtaining additional redress on

appeal by changing the legal rule applicable to his future conduct, even though the case against him seeking damages had been dismissed on summary judgment.[7] By the same reasoning, both a person who alleges injury from the defendant's violation of the TCPA and the defendant alleged to have committed such a violation have a live interest in establishing the correct standard to govern future communications.

2. An injunction that does not specifically forbid repetition of the conduct alleged in the complaint does not provide complete relief.

The purpose of an injunction is to prevent future violations of a legal right. Consequently, an appropriate injunction in a TCPA case would forbid the defendant from engaging in the conduct determined to violate the TCPA, not just restate the existing statutory prohibition. Rule 65(d)(1) requires "[e]very order granting an injunction" to "(C) describe in reasonable detail the act or acts restrained or required." *Chathas*, 233 F.3d at 512-13 (holding omission harmless because specific prohibitions were contained in earlier preliminary injunction that was made permanent). That is "no mere technical requirement[]." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).

Typically, a court crafts an injunction to restrain particular conduct that has been shown to be

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[7] That case was nonetheless moot because the plaintiff no longer had a personal stake in the outcome. *Id.* at 2034.

unlawful after trial, or that seems likely to be unlawful (for a preliminary injunction). The specifics of injunctive relief flow from the nature of the violation of law at issue. For example, a court would not prohibit a government from terminating property rights to certain government benefits without notice by issuing an injunction to comply generally with the Due Process Clause; nor would a court prohibit a failure to accommodate persons with disabilities by a bare injunction to comply with the Americans with Disabilities Act.

In combination with Petitioner's explicit refusal to admit a violation, the failure to specify in the injunction it offered what conduct is prohibited leaves the plaintiff exposed to repetition of the same illegal conduct. It is as if, upon the SEC's refusal to settle an action seeking injunctive relief against securities fraud without an admission of liability, a court were to dismiss the SEC's complaint on the basis of the defendant's offer to settle for an injunction against future violations of Rule 10b-5 without admitting a past violation or identifying what specific conduct would be forbidden in the future. While the SEC certainly could agree to such a disposition, it could also insist on more. When a party could legitimately seek additional relief, the relief offered in a settlement is not complete.

An unaccepted offer of injunctive relief in settlement can be regarded, at most, as a kind of *conditional* voluntary cessation, because the settlement offer is no longer binding once it has been refused (and expires as a matter of law if made under Rule 68). An offer that would not meet the standard

for voluntary cessation if based on the defendant's unilateral action cannot moot a case.

The point is illustrated by *Already, LLC*. Nike unilaterally issued a covenant that it would not enforce the trademark that Already sought to invalidate with regard to any shoe Already planned to manufacture. The Court held that Nike's covenant mooted the case because it was irrevocable, unqualified, and comprehensive.

Suppose that, instead of unilaterally issuing a covenant, Nike had offered to consent to an injunction with the same terms. Putting to the side the difference between the offer of an injunction and the entry of an injunction discussed in Part A, the question would remain whether the terms of the injunction really ended the threat of future injury. If the injunction mirrored the covenant, then presumably it would provide complete relief. But an offered injunction that simply prohibited Nike from wrongfully asserting trademark infringement—without specifying what trademark claims it would refrain from asserting—would not provide complete relief because it would not assure that Already could manufacture shoes without the threat of a future Nike infringement claim. The same is true of the kind of no-fault injunction offered in this case.

CONCLUSION

The Court should dismiss the writ as improvidently granted as to the first question presented or answer it "no"; it should reserve the second question for a case in which it is presented.

Respectfully submitted,

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